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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Court of Appeals for the Federal Circuit

GOLDHOFER FAHRZEUGWERK GMBH & CO., PLAINTIFF–APPELLANT *v.* UNITED STATES, DEFENDANT–APPELLEE

Appeal No. 89–1298

(Decided September 19, 1989)

James A. Geraghty, Donohue & Donohue, of New York, New York, argued for plaintiff-appellant.

Mark S. Sochaczewsky, Commercial Litigation Brlanch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer,* Acting Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade..
Judge TSOUCALAS.

Before ARCHER, *Circuit Judge,* COWEN, *Senior Circuit Judge,* and MICHEL, *Circuit Judge.*

MICHEL, *Circuit Judge:*

In this customs duty case, the United States Court of International Trade granted summary judgment in favor of the United States, holding that, as a matter of law, Goldhofer Fahrzeugwerk GmbH & Co.'s (Goldhofer) protest of liquidation was not timely filed with the United States Customs Service (Customs) within the 90-day protest period set forth by 19 U.S.C. § 1514(c)(2) (1982). *Goldhofer Fahrzeugwerk GmbH & Co.* v. *United States,* 706 F. Supp. 892 (Ct. Int'l Trade 1989). In reaching that disposition, the Court of International Trade concluded that posting "bulletin notice" of liquidation alone both complies with the applicable customs laws and regulations and satisfies the minimum constitutional standards for due process. We affirm.

ISSUES

Two principal issues are presented on appeal: First, whether the Court of International Trade erred by holding that posting bulletin notice of liquidation alone fully complies with the requirements of the applicable Customs statute and regulations; and, second, whether the Court of International Trade erred by concluding that Cus-

toms' failure to send "courtesy notice" by mail to Goldhofer did not abridge constitutional requirements for due process.

BACKGROUND

Goldhofer, a corporation organized under the laws of the Federal Republic of Germany, has its principal place of business in Memmingen, West Germany. Goldhofer was the importer of record of a certain multiaxle "gooseneck" semitrailer covered by Entry No. 101757 of February 16, 1980, at the port of Norfolk, Virginia.

A transcription error by Customs employees caused the name and address of Walsen Design and Manufacturing, and unrelated third party and stranger to the transaction, to be entered into Customs' data base in connection with the involved entry. Consequently, when the June 5, 1981, bulletin notice of liquidation was prepared for the port of Norfolk, Virginia, the importer of record for Entry No. 101757 was listed as Walsen Design and Manufacturing. Customs printed out the courtesy notice of liquidation and the bill for the duty increase. The bill and notice were mailed to the party indicated thereon, Walsen Design and Manufacturing. Goldhofer never received a courtesy notice or original bill.

In the Norfolk Customs Entry Control Section, the transcription error was discovered and a clerk manually annotated the bulletin notice to substitute the name of Goldhofer and its address in Memmingen, West Germany. On or about June 5, 1981, the bulletin notice of liquidation as annotated was posted at the Entry Control Section of the Norfolk Customhouse. No Customs official or employee took steps to correct the data base after the above described discrepancy was discovered and no Customs official or employee made any effort to furnish Goldhofer with courtesy notice.

Subsequently, Customs generated a "REBILL" dated September 4, 1981 (the 91st day after the June 5, 1981, liquidation) addressed to Goldhofer in Memmingen, West Germany. On December 1, 1981, Goldhofer filed a protest at the port of Norfolk, Virginia, covering the involved entry. That protest was received by Customs 179 days after the June 5, 1981, bulletin notice was posted, but on the 88th day after September 4, 1981, the date of the REBILL. Customs denied Goldhofer's protest as untimely because it was not filed within the 90-day protest period set forth by statute. 19 U.S.C. § 1514(c)(2) (1982).

Goldhofer, pursuant to 28 U.S.C. § 1581(a) (1982), brought action in the Court of International Trade contesting the denial of its protest. Before that court, Goldhofer argued that Customs' failure to provide courtesy notice of liquidation both violated Customs' own regulations and failed to meet the minimum constitutional requirements for due process. On that basis, Goldhofer contended that the June 5, 1981, liquidation was incomplete and that Goldhofer's December 1, 1981, protest was timely because it was filed within 90 days after Goldhofer received Customs' September 4, 1981, REBILL.

The United States responded and both parties filed cross motions for summary judgment.

On January 18, 1989, the Court of International Trade granted summary judgment to the United States, concluding that Goldhofer's protest of the June 5, 1981, liquidation was untimely. Goldhofer's motion for summary judgment was denied. For the reasons set forth below, we hold that the Court of International Trade committed no legal error in reaching this disposition.

Analysis

A. *Customs' statue and regulations were satisfied.*

Goldhofer argues that Customs failed both to comply with its own regulations and to follow its long established administrative practice by not "endeavor[ing]" to provide courtesy notice. These failures, Goldhofer contends, rendered liquidation incomplete and tolled the time within which the importer was required to file a protest. We are not persuaded.

Section 1500 of Title 19 of the United States Code (1982) provides the following:

> **§ 1500. Appraisement, classification, and liquidation procedure.**
>
> The appropriate customs officer shall, under rules and regulations prescribed by the Secretary—
>
> * * * * * * *
>
> (e) give notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in such regulations.

Pursuant to this statute, the Secretary promulgated the following regulation:

> **§ 159.9 Notice of liquidation and date of liquidation for formal entries.**
>
> (a) *Bulletin notice of liquidation.* Notice of liquidation of formal entries shall be made on a bulletin notice of liquidation, Customs Form 4333 or 4335 * * *.
>
> (b) *Posting of bulletin notice.* The bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry * * *, or shall be lodged at some other suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.
>
> * * * * * * *
>
> (d) *Courtesy notice of liquidation.* Customs will endeavor to provide importers or their agents with Customs Form 4333–A, "Courtesy Notice", for entries specified in § 159.9(a)(1), scheduled to be liquidated or deemed liquidated by operation of law.

> This notice shall serve as an informal, courtesy notice and not as a direct, formal, and decisive notice of liquidation.

The plain language of the implementing regulations is clear that the only notice of liquidation required is bulletin notice "posted for the information of importers in a conspicuous place in the customhouse at the port of entry." 19 C.F.R. § 159.9(b) (1988). Courtesy notice is just that, a "courtesy," and Customs' providing, or failure to provide, such a notice cannot create any legally cognizable right in the importer. *See United States* v. *Reliable Chemical Co.*, 605 F.2d 1179, 1184 (CCPA 1979) ("Early notice of liquidation, forwarded as a 'courtesy' by the Government, is not and cannot be converted into the statutory notice at the election of an importer.")

B. *The Due Process requirements of the Constitution were satisfied.*

In addition, Goldhofer argues that Customs' failure to provide courtesy notice abridged the minimum due process requirements of the Constitution. Goldhofer contends that, under those minimum requirements as articulated by the United States Supreme Court in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *Greene* v. *Lindsey*, 456 U.S. 444 (1982), *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983), and *Tulsa Professional Collection Services, Inc.* v. *Pope*, 108 S. Ct. 1340 (1988), Customs is required to provide Goldhofer mail notice of liquidation. We disagree.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. "Notice by mail or other means *as certain* to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite Board of Missions*, 462 U.S. at 800 (emphasis supplied) (quoted in *Tulsa Professional Collection Services, Inc.*, 108 S. Ct. at 1344). Clearly, Customs' liquidation of, and assessment of duties on, Goldhofer's goods are elements of a proceeding that may adversely affect Goldhofer's property interest in its goods. Because, as importer of record, Goldhofer's name and address are registered with Customs, Customs is constitutionally required to provide Goldhofer with notice "as certain to ensure actual notice" that liquidation has occurred, as would mail notice. *Id.* at 800.

In weighing the sufficiency of a form of notice on the basis of equivalence of likelihood of actual notice, the Supreme Court has looked to a number of considerations. First, and foremost, is whether the form of notice relies on chance alone to reach the attention of the interested party. *Mullane*, 339 U.S. at 315 (cited by *Mennonite*, 462 U.S. at 795–96). In addition, the Court has considered whether

the form of notice is designed to attract the attention of the interested party. *Mennonite,* 462 U.S. at 799. Third is whether the actual means of providing notice is reliable. *Greene,* 456 U.S. at 453. Finally, "the reasonableness of the notice provided must be tested with reference to the existence of 'feasible and customary' alternatives and supplements to the form of notice chosen." *Id.* at 454 (quoting *Mullane,* 339 U.S. at 315).

Here, bulletin notice does not rely on chance alone to bring notice of liquidation to the attention of the importer. By voluntarily entering its goods into the Customs Territory of the United States, Goldhofer was statutorily notified that, as a matter of law, its goods would be liquidated. 19 U.S.C. § 1500(d) (1982) ("The appropriate customs officer shall * * * liquidate the entry of such merchandise * * *."). Customs regulations, promulgated pursuant to statute, provide that notice of liquidation shall be posted at the customhouse at the port of entry of the goods. Therefore, Goldhofer, by choosing to enter its goods at a particular port of entry, knew that liquidation would occur there and selected that precise location to receive the notice of that liquidation. Although we recognize that the interested party's knowledge of an impending government proceeding does not relieve the government of its obligation to provide that party with adequate notice, *see Mennonite,* 462 U.S. at 800, the existence, or lack thereof, of that knowledge may be considered in weighing the constitutional sufficiency of a form of notice on the basis of equivalent likelihood of actual notice.

In addition, bulletin notice is designed to attract the attention of the interested party. 19 C.F.R. § 159.9(b) (1988) ("The bulletin notice of liquidation shall be posted for the information of importers * * *."). Among other things, bulletin notice lists the name of the importer of record, the date of entry, the liquidation date, the region/district/port number, the action, and the type of entry and number. In contrast, the form of notice used in *Tulsa, Mennonite,* and *Mullane* did not specifically name the party seeking notice. In those cases, the notice either generally referred to a class or group in which the party seeking notice fell, *see Tulsa,* 108 S. Ct. at 1342 (notice generally to the creditors of the deceased); *Mullane,* 339 U.S. at 309–10 (notice addressed generally without naming them to all parties interested in a common trust fund), or was designed primarily to reach an entirely different class or group. *See Mennonite,* 462 U.S. at 799 (notice primarily designed to attract prospective purchasers to a tax sale and could not be expected to lead to actual notice to the mortgagee). In addition, in those cases, notice generally was only periodically made available to the interested parties by infrequent publication in some unspecified local newspaper. *See Tulsa,* 108 S. Ct. at 1342 (executor or executrix must publish notice in some newspaper in the country once each week for two consecutive weeks); *Mennonite,* 462 U.S. at 793 (county auditor must post notice in the county courthouse and publish notice in a local newspaper

once each week for three consecutive weeks); *Mullane,* 339 U.S. at 309–10 (petitioner shall publish notice not less than once in each week for four successive weeks in a newspaper to be designated by the court). Here, however, as discussed above, Customs continuously provided bulletin notice at the specific location, i.e., the customhouse at the port of entry of the goods, selected by Goldhofer when it entered its goods into the United States Customs Territory.

Moreover, bulletin notice posted in the customhouse has not been shown to be an unreliable means of providing notice. In *Greene,* the Supreme Court considered the constitutionality of a form of notice in forcible entry or detainer proceedings consisting of posting a copy of the summons, stating the name of the interested party and the time and place of the meeting of the court, on the door of the apartment leased by the party seeking notice. *Greene,* 456 U.S. at 446. In that case, the form of notice both did not rely on chance alone to bring the notice to the attention of the interested party and was designed to attract the attention of that party. Nonetheless, the Court concluded that the method of notice failed to meet the constitutional minimums of due process because, in the circumstances of that case, the posted notices were "not infrequently" removed before they could have their intended effect. *Id.* at 453. Here, however, there is no evidence in the record, and it has not been proffered, that bulletin notices posted in the customhouse have been removed by anyone before they could have their intended effect of notifying the importer of record, and any other interested parties, that liquidation has occurred.

Finally, in determining whether reasonably feasible and customary alternatives and supplements to bulletin notice exist, we must look to the purpose and effect of the type of notice given. Here, bulletin notice of liquidation has both a legal effect and a warning effect. As to the former, mail notice is not a viable alternative or supplement because it is well established that, as a matter of law, the information contained on the bulletin notice controls issues relating to liquidation. *See, e.g.,* 19 C.F.R. § 159.9(c)(2)(iii) (1988) (providing that a protest relating to a liquidation "shall be filed within 90 days from the date the bulletin notice of liquidation * * * is posted or lodged in the customhouse"); *Reliable Chemical Co.,* 605 F.2d at 1183 (recognizing that, as a matter of law, "the date of liquidation shall be the date the bulletin notice is posted in the customhouse"). As to the latter, we cannot disagree that mail notice can always supplement any type or form of notice. However, the Supreme Court has not held that mail notice must be an integral step in *every* notice scheme and neither shall we. In the circumstances of this case, posting of bulletin notice of liquidation in the customhouse at the port of entry alone was as certain to ensure actual notice of liquidation to the importer of record or its local Customs broker as mail notice and, therefore, mail notice was not constitutionally required.

CONCLUSION

In view of the foregoing, the decision of the Court of International Trade is

AFFIRMED.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 89-120)

ATMEL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANTS, AND INTEL CORP., DEFENDANT-INTERVENOR

Court No. 89-08-00464

[Dismissed for lack of jurisdiction.]

(Dated August 25, 1989)

Heller, Ehrman, White & McAuliffe (*Randall C. Boyce* and *Karen A. Ammer*), *Amtel Corp.* (*J. Michael Ross*) for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office (*Barbara M. Epstein*), Civil Division, United States Department of Justice and *Evelyn Suarez*, United States Customs Service, for defendant.

Arnold, White & Durkee (*Kenneth D. Goodman*) for defendant-intervenor.

OPINION

RESTANI, *Judge:* On August 7, 1989, Amtel Corporation brought this action challenging Customs Service's exclusion of several shipments of Atmel's EPROMs from entry into the United States.[1] EPROMs are erasable, programmable read only memories. Basically these items contain electronic circuits for use in other devices. Jurisdiction is sought under either 28 U.S.C. § 1581(a) or (i) (1982). Jurisdiction is also alleged under 28 U.S.C. § 1581(h) (1982) with regard to shipments for which entry has not as yet been sought. Atmel moved for a temporary restraining order on the day it brought this action. Its motion was denied on August 8, 1989. It now seeks a preliminary injunction against exclusion of its EPROM shipments.

The United States has moved to dismiss this action for lack of jurisdiction. Intel Corporation has been permitted to intervene as a defendant for purposes of contesting jurisdiction.

[1]There appear to be four separate entries in San Francisco at issue, 452-0055-022-1, 452-0055-739-0, 452-0055-601-2, 452-0056-561-7. The shipments appear to have arrived in the United States between July 5, 1989 and July 25, 1989 and were excluded on July 14, 20 and 31, 1989.

The exclusion of plaintiff's merchandise is the result of Customs Service's attempt to comply with an International Trade Commission (ITC) exclusion order.[2] The order resulted from a proceeding under 19 U.S.C. § 1337 (1982) which adjudicated Intel Corporation's claim that Atmel's imported EPROMs of certain densities were infringing various United States patents held by Intel. The parties are in agreement that any challenge to ITC'S decision is not before this court but that this court may review Customs' enforcement of ITC's decision.[3] The essential disagreement is whether Customs' enforcement action may be reviewed by the court at this time.

JURISDICTION UNDER 28 U.S.C. § 1581(a), PROTEST DENIAL[4]

In order for jurisdiction to attach under 28 U.S.C. § 1581(a) there need be a written document sent to the District Director of Customs which contains the essential elements of a protest. Of relevance here, the protest must evidence a claim against prior Customs Service action, the reasons for the claim, the entries involved and the importer. The entry dates and importer number are also required. *See* 19 C.F.R. § 174.13 (1988).

Apart from the August 11, 1989 formal protest of the entries at issue, the only document in evidence which was sent to the relevant District Director after exclusion of any Atmel entries is a July 28, 1989 letter, which details the reasons for Atmel's complaint. That letter, however, does not reference particular entries, rather, it refers generally to "three shipments." Furthermore, the letter does not identify the importer of record by name or number, as required by Customs' regulation. Assuming that some formalities may be overlooked (although it is difficult, if not impossible, to overlook the absence of identification of specific entries), the letter has other deficiencies. Among other things, the letter does not indicate clearly that it is a protest of an exclusion under 19 C.F.R. § 174.21(b) (1989).[5] Such a facial designation is a prerequisite to the 30 day expedited disposition of a protest of exclusion as provided in the regulation. Ordinarily, without such a clear designation Customs would not be in a position to know that the prosecuting party is going to

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[2]The ITC order of March 16, 1989 prohibits entry into the United States of Amtel's EPROMs of 64, 256, 512 or 1024 kilobits which offend certain patents, with exceptions, such as sales to the United States.

[3]Apparently, Customs must decide which Amtel products match those found by ITC to infringe.

[4]28 U.S.C. § 1581(a) provides:

CIVIL ACTIONS AGAINST THE UNITED STATES AND AGENCIES AND OFFICERS THEREOF

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

[5]19 C.F.R. § 174.21(b) provides:

(b) *Protests relating to exclusion of merchandise.* If the protest relates to an administrative action involving exclusion of merchandise from entry or delivery under any provision of the Customs laws, the district director shall review and act on a protest filed in accordance with section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), within 30 days from the date the protest was filed, unless the person filing the protest shall request an additional delay for the purpose of presenting evidence or argument with respect to the matters involved in the protest. In no event shall the district director (or the Commissioner of Customs or his designee if the protest is the subject of further review as provided for in §§ 174.25 and 174.26) delay action on the protest beyond 30 days, or such additional time period as may be agreed to by the person filing the protest. *Any protest filed pursuant to this paragraph shall clearly so state on its face* (emphasis added).

present its entire case in a very short time period, and that Customs must single out the protest for expedited resolution.

More importantly to the jurisdictional dispute at hand, assuming that the July 28, 1989 letter may be considered a protest under 19 C.F.R. § 177.21(b) because of surrounding circumstances, there has been no written denial of the "protest." An exclusion order dated July 31, 1989 references a shipment which arrived in the United States on July 25, 1989 and not the shipments which were ordered excluded by the July 14 and July 20 letters. The July 31, 1989 letter does not appear to be a response to the July 28, 1989 letter, and it cannot reasonably be interpreted as other than a separate exclusion order.

Atmel argues that the requirement of a written denial should be waived because further administrative processing would be futile. Assuming such a waiver would be appropriate, the court is unconvinced of either legal or factual futility. There is no final decision of the Customs Service on the protest, although there are clear indications in the record that the Customs' Laboratory Director came to a fairly firm conclusion as to the excludability of the merchandise. In addition, counsel has recently obtained a description of the laboratory's reasoning and should be able to explain its position even more clearly to Customs. Thus, the necessity for this action may yet be obviated. If not, mandatory administrative procedures should soon run their course. They have not done so to date, however. Accordingly, the court lacks jurisdiction over this action under 28 U.S.C. § 1581(a).

Jurisdiction Under 28 U.S.C. § 1581(h),[6] Preimportation Review of Customs Ruling

Putting aside numerous problems as to whether the preimportation and irreparable harm requirements of 28 U.S.C. § 1581(h) are met, there is no evidence of a Customs "ruling" within the meaning of § 1581(h).

Atmel cites a July 27, 1987 trade bulletin from the Dallas district director indicating that all Atmel EPROMs of certain densities should be excluded. This directive, however, is not binding on the relevant district director, who is in San Francisco. The only Customs headquarters' directive in evidence, even as later amended, essentially reflects the language of the ITC exclusion order; it leaves to particular districts the task of determining which Atmel imports infringe. No particular circuitry is discussed in that directive.

Accordingly, the court finds no jurisdiction under 28 U.S.C. § 1581(h).

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[6] 28 U.S.C. § 1581(h) provides:

> (h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

JURISDICTION UNDER 28 U.S.C. § 1581(i), RESIDUAL JURISDICTION

Jurisdiction under 28 U.S.C. § 1581(i) may apply if other remedies for review of Customs' administrative determinations are manifestly inadequate. If a party could have utilized 28 U.S.C. § 1581(a) to obtain timely review, 28 U.S.C. § 1581(i) cannot be utilized. *See Omni U.S.A., Inc.* v. *United States*, 840 F.2d 912, 915 (Fed. Cir. 1988).

Assuming Atmel had proceeded as expeditiously as possible, jurisdiction could have attached as early as August 15, 1989, and apparently for all products as early as August 20, 1989. The court has heard no evidence that had proceeding progressed at that pace, the remedies would still have been manifestly inadequate.[7]

Because of its confidential nature, the court does not wish to discuss Atmel's proof of injury in this opinion. Suffice it to say that even if all steps had been accomplished as soon as possible Atmel probably would have experienced some business losses. The probability of some business losses is not enough to cause the court to conclude that the 30-day exclusion protest disposition period should not be permitted to run. Proof of serious and irreparable harm in a factual sense can amount in certain cases to a demonstration that the mechanisms of 28 U.S.C. § 1581(a) are manifestly inadequate as a legal matter. The court is unconvinced that in this case there has been such a showing with regard to plaintiff's business situation in the context of the remedies that were available.

Defendants have argued that remedies were also available at the ITC. The court is unaware if such remedies were effectively available in terms of timeliness. In any case, 28 U.S.C. § 1581(a) will be available if Atmel's protest is denied in whole or in part.

Accordingly, this action is found to be premature and is dismissed for lack of jurisdiction.

(Slip Op. 89–121)

NICHIMEN AMERICA, INC., FORMERLY KNOWN AS NICHIMEN CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–01–00047

[Defendant's motion to dismiss is granted; case dismissed.]

[7]If Customs fails to act within 30 days, jurisdiction might not attach under § 1581(a) until 120 days have run. *See Cherry Lane Fashion Group, Inc.* v. *United States*, 13 CIT ——, 712 F. Supp. 190 (1989). Although the court rejected § 1581(i) jurisdiction as well in *Cherry Lane*, the factual pattern differs from the case at hand. In any case, for purposes of the action before the court today the court must assume, until a demonstration to the contrary, that Customs will act expeditiously in accordance with § 174.21(b), that is, within 30 days of an exclusion protest, when proper procedures are employed. Thus, the court does not decide today whether jurisdiction would lie under 28 U.S.C. § 1581(a) or (i) if Customs does not act within a properly invoked 30-day period under 19 C.F.R. § 174.21(b). Any such opinion at this time would be advisory.

(Dated August 29, 1989)

Arvey, Hodes, Costello & Burman (*Ralph A. Mantynband, Edward H. Soderstrom, II*) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney Genral, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*) for the defendant.

Opinion and Order

CARMAN, *Judge:* Defendant moves to dismiss this action on the grounds that the assessment of antidumping duties is not a protestable matter and therefore the Court does not possess jurisdiction to entertain plaintiff's claim pursuant to 28 U.S.C. § 1581(a) (1982).

Facts

These facts are essentially the same as those outlined in 12 CIT ——, Slip Op. 88–128 (September 22, 1988). Plaintiff is the importer of ten television receivers manufactured and imported from Japan between May and November of 1976. During this time period Japanese television receivers were subject to an antidumping order issued by the Treasury Department in March of 1971. See T.D. 71–76, 36 Fed. Reg. 4,597 (Mar. 10, 1971). These receivers were released prior to formal entry under a special delivery permit accompanied by an immediate consumption and entry bond. The amount of duties, combining both normal customs and antidumping duties, was estimated at a rate of 9 percent *ad valorem*, and the goods were released into the stream of commerce between May and November, 1976.

On August 30, 1985, Commerce notified plaintiff by certified mail that its receivers entered from September 9, 1970 through March 31, 1979 would be assessed at 3.37 percent *ad valorem* if plaintiff did not request a periodic review of amount of duty pursuant to Section 751(a) of the Trade Agreements Act of 1979, 19 U.S.C. § 1675(a) (hereinafter section 751 review). No request was made for a section 751 review of receivers which entered during 1976. These receivers were liquidated and assessed with antidumping duties at a rate of 3.37 percent *ad valorem*. Plaintiff then filed a protest challenging the assessment of antidumping duties. Following denial of the protest, plaintiff brought this action pursuant to 28 U.S.C. § 1581(a) complaining about the assessment of antidumping duties.

Plaintiff filed a motion for summary judgment, or in the alternative, judgment on the pleadings. Defendant opposed and cross-moved for summary judgment on the grounds that this Court did not possess jurisdiction to entertain plaintiff's action and that defendant was entitled to judgment. This Court denied the cross-motions had denied defendant's application to dismiss for lack of jurisdiction with leave to renew. 12 CIT ——, Slip-Op. 88–128.

DISCUSSION

Since plaintiff's merchandise was imported prior to January 1, 1980 and assessed after January 1, 1980, one must look to the Antidumping Duty Act of 1921, (hereinafter the 1921 Act), the Trade Agreements Act of 1979 (hereinafter the 1979 Act) and its Transitional Rules in order to arrive at a decision as to the Court's jurisdiction in the instant case. Since this merchandise was imported prior to January 1, 1980, which was the effective date of the 1979 Act, the applicable antidumping duty provisions are contained in the 1921 Act. *See*, 19 U.S.C. §§ 160–173 (1976). Section 161(a) provided for the payment of a special dumping duty equal to the difference between the foreign market price and the purchase price (or the exporter's sales price). The payment of customs duties could have been protested pursuant to 19 U.S.C. § 1514(a) (1976). If that protest was denied, a civil action to contest the denial could have been brought before the United States Customs Court pursuant to 28 U.S.C. § 2632 (1976).

The Transitional Rules of the 1979 Act specifically state that dumping findings issued under the 1921 Act which were in effect up to January 1, 1980 "shall remain in effect, subject to review under section 751 of the Tariff Act of 1930." Trade Agreements Act of 1979, Pub. L. No. 96–39, § 106, 93 Stat. 144, 193 (1979).

Section 751(a) of the 1979 Act, 19 U.S.C. § 1675(a), as amended by the Trade and Tariff Act of 1984, provides in pertinent part:

> **§ 1675. Administrative review of determinations.**
> (a) Periodic review of amount of duty.
>
> (1) In general:
> At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—
>
> (A) review and determine the amount of any net subsidy,
> (B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty. * * *
> * * * * * * *
>
> and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

19 U.S.C. § 1675(a) (1982 & Supp. V. 1987).

Congress did not specifically state how Commerce was to determine the amount of antidumping duties when no section 751 review was requested. It was left to the discretion of the Secretary to provide regulations for duty assessment including the conversion of cash deposits of estimated duties previously ordered. *See,* H.R. Rep. No. 1156, [Conf. Rep. to accompany H.R. 3398], 98th Cong., 2d Sess. 181 (1984).

Commerce set forth procedures for requesting administrative reviews in 19 C.F.R. § 353.53a(a) and (b) (1986) and 19 C.F.R. § 355.10(a) and (b) (1986) and for conducting administrative reviews if requested in 19 C.F.R. § 353.53a(c) (1986) and 355.10(c) (1986). The procedure for assessing antidumping duties when a review is not requested is outlined in 19 C.F.R. § 353.53a(d)(1):

> (d) *Automatic assessment of duties.* (1) For orders or findings, if the Secretary does not receive a timely request under paragraph (a)(1), (a)(2), (a)(3), or (a)(5) of this section, the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise described in paragraphs (b)(1) through (b)(3) of this section at rates equal to the cash deposit of (or bond for) estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

19 C.F.R. § 353.53a(d)(1) (1986), 50 Fed. Reg. 32,558 (Aug. 13, 1985)

Judicial review of antidumping and countervailing duty determinations, including section 751 reviews were provided for in Title X of the 1979 Act. Title X amended 19 U.S.C. § 1514 as follows:

> (b) Finality and conclusiveness of customs officers' determinations.
>
> With respect to determinations made under section 1303 of this title or subtitle IV of this chapter which are reviewable under section 1516a of this title, determinations of the appropriate customs officer are final and conclusive upon all persons (including the United States and any officer thereof) unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Customs Court [Court of International Trade].

19 U.S.C. § 1514(b) (1976 & Supp. III 1979).

Section 1002(b)(3) of the 1979 Act stated that amendments made by Title X, "shall apply with respect to the review of the assessment of, or failure to assess, any countervailing duty or antidumping duty on entries subject to countervailing duty order or antidumping finding if the assessment is made after the effective date [January 1, 1989]." 93 Stat. at 307. Since the assessments in the instant case were made on August 15, 1986, this amendment applies.

Plaintiff argues that the sentence immediately following the one quoted above in section 1002(b)(3) entitles it to judicial review. That second sentence reads:

> If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, on which such order, finding, or lack thereof is based, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.

Trade Agreements Act of 1979, Pub. L. No. 96–39, title X, § 1002(b)(3), 93 Stat. 300, 307 (1979).

Defendant points out, however, that the legislative history indicates that this sentence applies to the underlying determination made by the Secretary of the Treasury or the Commission.[1] Plaintiff cites *Goldsmith & Eggleton, Inc. v. United States,* 5 CIT 127, 563 F. Supp. 1377 (1983) to support its position. In *Goldsmith*, an importer's challenge of a 1973 dumping determination was dismissed as premature when duties were not yet assessed. However, as defendant notes, plaintiff in the instant case is not challenging the underlying dumping determination. Rather, plaintiff is challenging Commerce's decision to assess antidumping duties at a rate of 3.37 percent *ad valorem*. Congress has specifically stated that an assessment made after January 1, 1980 must be challenged under the review provisions of the 1979 Act.

Plaintiff argues that the fact that Commerce did not conduct an administrative review on its own initiative for the time period January 1, 1980 to October 30, 1984 prejudiced its position. The Court notes that Commerce gave plaintiff the opportunity to request a section 751 review in 1985, but plaintiff did not act on this request. After failing to act, plaintiff contends that it was prejudiced by Commerce's lack of initiative.

Defendant points out that statutory time periods such as the period for conducting a review under 19 U.S.C. § 1675(a) have been held to be directory and not mandatory and that a delay in conducting such a review does not diminish Commerce's authority to assess duties covered by an outstanding finding or order. In *Usery* v. *Whitin Machine Works, Inc.* 554 F.2d 498, 501 (1st Cir. 1977), the United

[1]See H.R. Rep. No. 317, 96th Cong., 1st Sess. (1979) at 182–83:

> Subsection [1002](b)(3) states that the amendments made by this Title shall apply with respect to the review of the assessment (or failure to assess) of any countervailing or antidumping duty on entries subject to a countervailing duty order or antidumping finding if the assessment is made after the effective date.
>
> However, with respect to review of the *underlying determination* upon which such orders or findings (or lack thereof) are based, subsection (b)(3) states that if no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date. The purpose of this rule is to ensure that determinations which are made prior to the effective date of the bill, and therefore not reviewable in accordance with the provisions of this Title, do not escape review entirely. Under current law, determinations by the Secretary and the ITC (with the exception of a negative final determination by the Secretary concerning less than fair value sales or the existence of a subsidy) are reviewable only through a challenge to the assessment of or the failure to assess antidumping or countervailing duties. Thus, if a determination is made prior to the effective date, but the first assessment which can serve as the basis for review occurs after the effective date, review of such a determination would not be available under either current law or the bill. This provision ensures that this does not occur and that rights of review under current law are preserved where necessary.

States Court of Appeals for the First Circuit determined that nothing in the statutes covering trade adjustment assistance suggested that a time limitation upon the Secretary of Labor was designed to be jurisdictional and that absent clear indication that Congress intended such time limits to be strictly enforced, the court would refrain from doing so. In *Phillip Bros., Inc.* v. *United States*, this court noted the following concerning a late section 751 review: "Although ITA's failure to comply with the statutory time limit is not condoned by this court, this failure to act in a timely manner did not deprive ITA of jurisdiction to complete the section 751 review." 10 CIT 76, 83, 630 F. Supp. 1317, 1324, (1986) (footnote omitted).

While this Court acknowledges that it cannot condone Commerce's lateness in complying with the time limit in question, it holds that plaintiff was not prejudiced by Commerce's delay, since plaintiff chose not to request a section 751 review when that opportunity was presented by Commerce.

Returning to the jurisdictional argument, even if a section 751 review had been conducted, plaintiff's only challenge would have been pursuant to 28 U.S.C. § 1581(c) as provided in 19 U.S.C. § 1516a.

Defendant points out that although section 751 reviews are reviewable by this Court pursuant to 19 U.S.C. § 1516a, and if such a section 751 review had taken place in this case, it would have been reviewable by this Court, this does not render the antidumping duty assessment protestable under 19 U.S.C. § 1514. Plaintiff did not exercise its right to request a review. Had it done so, plaintiff could have obtained judicial review from this Court.

Conclusion

Plaintiff was given the opportunity to request a section 751 review at the invitation of Commerce, but did not choose to do so. The Transitional Rules of the 1979 Act specifically state that dumping findings which were issued under the 1921 Act shall remain in effect subject to review under section 751 of the Tariff Act of 1930. It was left to the discretion of the Commerce Secretary to determine the amount of antidumping duties when no section 751 review was requested and the method of automatic assessment of duties was set out in the Federal Register and codified in 19 C.F.R. § 353.53a(d)(1). Amendments made by the 1979 Act applied to assessments of antidumping duties made after January 1, 1980. Since the assessments in the instant case were made on August 15, 1986, the amendment stating that decisions of the appropriate customs officer are final unless a civil action is commenced under 19 U.S.C. § 1516a applies. *See*, 19 U.S.C. § 1514(b) (1976 & Supp. III 1979).

For the reasons stated herein, this Court does not possess jurisdiction to entertain plaintiff's claim under 28 U.S.C. § 1581(a). Defendant's motion to dismiss is granted and this action is dismissed.

(Slip Op. 89–122)

BEARINGS IMPORTERS GROUP OF THE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., AND GE AIRCRAFT ENGINES, A DIVISION OF GENERAL ELECTRIC CO., PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS

Court Nos. 89–06–00360, 89–06–00361, 89–06–00362, 89–06–00363, 89–06–00364

OPINION AND ORDER

Plaintiffs timely filed summonses seeking to commence five separate actions contesting certain aspects of final determinations made by the United States International Trade Commission, but did not, as required by section 516A(a)(2)(A) of the Tariff Act of 1930, as amended, file complaints within 30 days after the filing of each summons.

Held: Since plaintiffs did not satisfy the two prerequisites of section 516A(a)(2)(A) of the Tariff Act of 1930, as amended, for commencing an action in this court to contest a reviewable determination listed in section 516A of the Tariff Act of 1930, as amended, the court has no jurisdiction and, *sua sponte,* dismisses the five actions. *See Georgetown Steel Corp.,* v. *United States,* 801 F.2d 1308 (Fed. Cir. 1986).

[Court, *sua sponte,* dismisses the five actions.]

(Dated August 30, 1989)

McKenna, Conner & Cuneo, (*Peter Buck Feller* and *Lawrence J. Bogard*), for plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director Commercial Litigation Branch, Civil Division, United States Department of Justice, for defendants.

RE, *Chief Judge:* In these five actions, plaintiffs, Bearings Importers Group, seek to contest certain aspects of the final affirmative determinations of material injury made by the United States International Trade Commission in the antidumping investigation of *Antifriction Bearings (other than Tapered Roller Bearings) and Parts Thereof* from the United Kingdom, Italy, the Federal Republic of Germany, France and Japan.

Plaintiffs sought to commence the five actions pursuant to 28 U.S.C. § 1581(c) (1982) and section 516A(a)(2)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A) (Supp. V 1987). Section 516A(a)(2)(A) imposes two requirements for commencing an action under 28 U.S.C. § 1581(c). To commend an action under section 1581(c), a party must: (1) file a summons within 30 days after the date of publication in the Federal Register of the order, which is based upon the contested administrative determination, and (2) file a complaint within 30 days after the filing of the summons. 19 U.S.C. § 1516a(a)(2)(A).

The Court of Appeals for the Federal Circuit, in *Georgetown Steel Corp.* v. *United States,* 801 F.2d 1308, 1311 (Fed. Cir. 1986), has held that the statute requires both steps, and imposes precise time limits within which each step must be taken. In the language of the Court of Appeals, the statute "requires that the complaint be filed within 30 days after the summons is filed." *Georgetown Steel* at 1313.

The antidumping orders that resulted from the determinations contested in these actions were published in the Federal Register on May 15, 1989. *See* 54 Fed. Reg. 20,900–904 and 20,910 (1989). On June 14, 1989, plaintiffs timely filed five summonses seeking to commence each of the five actions, thereby satisfying the first condition of section 516A(a)(2)(A). Plaintiffs, however, did not file complaints in any of the five actions. Clearly, therefore, plaintiffs did not comply with the second requirement of the statute that a complaint be filed within 30 days after the filling of the summons. In fact, in response to correspondence from the Office of the Clerk, counsel for plaintiffs indicated that complaints were not filed since they did not intend to pursue these actions.

Since plaintiffs have not filed a complaint in any of the five actions, they have not satisfied the second requirement of section 516A(a)(2)(A), namely the filing of complaints within 30 days after the filing of the summonses. Hence, they have failed properly to invoke the jurisdiction of the court. Accordingly, the court, *sua sponte,* pursuant to USCIT R. 12(h)(3), hereby dismisses these actions for lack of jurisdiction.

(Slip Op. 89–123)

ALEXANDRIA INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86–05–00575

Where the imported merchandise in question was labelled, imported, marketed, bought and sold as "sardines", it was properly classified as sardines for purposes of customs duties under the tariff schedules, even though the parties stipulated that the product was within the scientific meaning of "anchovies". The government presented ample, convincing evidence of a common and commercial meaning of "sardine" that includes not only "true" sardines within the scientific meaning of that term, but also other, closely related and similarly packaged fishes, including the merchandise at issue here. Plaintiff in fact adopted the government's classification by representing its product in commerce as "sardines", rather than "anchovies". Customs' classification is therefore affirmed.

OPINION

(Decided August 31, 1989)

Barnes, Richardson & Colburn (*Leonard Lehman* and *Melvin E. Lazar*) for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Nancy M. Frieden*) Civil Division, U.S. Department of Justice, for defendant.

BACKGROUND

MUSGRAVE, *Judge:* Plaintiff Alexandria, an importer of the product in question here, challenges the classification of its product by the Customs Service as "sardines" rather than "anchovies". The Court

has before it the somewhat anomalous situation in which the plaintiff identifies its products as *sardines,* but insists that they are *anchovies,* while defendant stipulates that the products are *anchovies* but argues that they must be classified as *sardines.* The parties have submitted the case on a Stipulation of Facts in lieu of trial.

According to the parties' Stipulation,

> the items at issue, imported from Yugoslavia, are labelled, advertised, bought, sold and marketed as "cocktail" or "small" sardines with the following trademarked brand name:
>
> Fisherman's Harvest
>
> * * * * * * *
>
> COCKTAIL SARDINES

In addition, the stipulation shows that the statement of contents corresponds to the above description:

> The ingredients statement contained on the packaging in which the imported articles are sold by plaintiff to its customers, and eventually to the ultimate consumer, reads as follows:
>
> INGREDIENTS; SMALL SARDINES, SOYBEAN OIL, VINEGAR * * * SALT

The merchandise is described on the accompanying commercial invoices as "Fisherman's Harvest Brand Sardines (like smoked anchovy style)." These stipulations accurately describe several samples of the product provided to the Court as evidence.

In accordance with the foregoing circumstances, the Customs Service classified and liquidated the plaintiff's product under item 112.82 of the Tariff Schedules of the United States as follows:

> Fish, prepared or preserved in any manner, in oil, in airtight containers:
>
> * * * * * * *
>
> Sardines:
>
> * * * * * * *
>
> Valued over 30 cents per pound (including weight of immediate container):
>
> Neither skinned nor boned:
>
> * * * * * * *

112.82	Not smoked	15% ad valorem.

Notwithstanding these facts, the plaintiff asserts that its product should instead be classified as "anchovies" under the Tariff Schedules, as follows:

Fish, prepared or preserved, in any manner, in oil, in airtight containers:

112.40 Anchovies .... Free (A)
(Under the Generalized System of Preferences)

The principal significance of the distinction is that sardines are subject to a 15% import duty, while anchovies from Yugoslavia are exempt from such duties under the Generalized System of Preferences.

The parties have stipulated that the items are indeed anchovies within the scientific meaning of that term:

> 12. Scientifically, anchovies are not sardines and the scientific differences have been recognized since 1817.
>
> 13. The merchandise involved herein is scientifically identifiable as anchovies of the Genus *Engraulus,* within the family *Engraulidae.*

While these stipulations seemingly contradict the government's argument that the items were properly classified as "sardines" rather than "anchovies", the government contends that the scientific meanings of these two terms differ from their meanings in common and commercial usage; that in common and commercial usage, the particular type of anchovies at issue here are considered sardines; and that this Court should therefore sustain as correct the Customs Services' classification.

The issue in this case is whether items which are scientifically classifiable as anchovies, but which were labelled, imported, marketed, bought and sold as sardines, are properly classifiable for Customs purposes as anchovies or as sardines.

Discussion

The decisions of the Customs Service regarding classification of imported items are presumed to be correct, and the party challenging such a classification bears the burden of proving otherwise. 28 U.S.C. § 2639(a)(1). *See Stewart-Warner Corp.* v. *United States,* 748 F.2d 683 (Fed. Cir. 1984); *Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, C.D. 4783, 468 F. Supp. 1318 (1979); *Schott Optical Glass, Inc.* v. *United States,* 11 CIT——, Slip Op. 87-132 (7 Dec. 1987). This presumption of correctness applies not only to the Service's ultimate classification decision, but also to every subsidiary fact necessary to support that decision, *United States* v. *New York Merchandise Co.,* 58 CCPA 53, C.A.D. 1004, 435 F.2d 1315 (1970); *Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, 4783, 468 F. Supp. 1318 (1979). The Service is presumed as a matter of law to have found the existence of every fact necessary to support a classification decision. *W.A. Gleeson* v. *United States,* 58 CCPA 17, C.A.D. 998, 432 F.2d 1403 (1970); *Novelty Import Co.* v. *United States,* 53

CCPA 28, C.A.D. 872 (1966); *F.H. Kaysing, Inc.* v. *United States,* 49 CCPA 69, C.A.D. 798 (1962). This presumption, then, determines the importer's burden of proof: to overcome the presumption, the importer must prove that the Service's classification is wrong.

In the present case, Alexandria asserts that the scientific meanings of the words "anchovies" and "sardines" are the same as the common meanings of these terms as used in the Tariff Schedules; and that this being the case, the government's stipulation that the imported merchandise is anchovies within the scientific meaning of this term requires that the items be classified as anchovies for customs purposes. The attractiveness of this syllogistic argument is self-evident; however the major premise is subject to doubt by reason of the rules of construction of customs terminology, the trade usage in this product area, and the marketing procedures employed with regard to the particular items involved here.

As a general rule, the classification terms used in the tariff schedules are construed in accordance with their common and commercial meanings, which meanings are presumed to be the same. *United States* v. *Victoria Gin Co.,* 48 CCPA 33, C.A.D. 759 (1960); *Nippon Kogaku (USA), Inc.* v. *United States,* 69 CCPA 89, Appeal No. 81–29, 673 F.2d 380 (1982). It is well established that where the scientific meaning of a tariff term differs from the term's common or commercial meaning, the term is not to be construed according to the scientific meaning, absent a contrary intent by Congress in using the term. In 1824 Mr. Justice Storey wrote:

> The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade.
>
> * * * * * * *
>
> [Congress] did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic. And it would have been as dangerous as useless, to attempt any other classification than that derived from the actual business of human life.

Two Hundred Chests of Tea, 9 Wheat. 430, 438, 6 L.Ed. 128, 130 (1824).

The Court of Customs Appeals wrote in 1915 that "tariff acts are drafted not in the terms of science, but in the language of commerce, which is presumptively that in common use * * *" *Meyer & Lange* v. *United States,* 6 Ct. Cust. Appls. 181 (1911).

In the present case, the parties have stipulated that the items at issue fall within the scientific meaning of the term "anchovies". The question, then, is whether this scientific meaning corresponds with the common and commercial meanings of "anchovies", so as to indicate that the items are properly classifiable as such. The taxonomic schema for classifying organisms, abridged to fit the present

controversy, consists of the following categories, in descending order from the broadest to the most specific: Kingdom, Phylum, Class, Subclass Order, Suborder, Family, Genus, and Species. *See 18 McGraw-Hill Encyclopedia of Science & Technology* 137 (1987). The parties have stipulated, and recount in their briefs, that anchovies fall within the family *Engraulidae,* while sardines are classified in the family *Clupeidae.* More broadly, the Court notes that both anchovies and sardines fall within the class *Actinopterygii,* the subclass *Teleostei,* the order *Clupeiformes* and the suborder *Clupeoidei. See 19 The New Encyclopaedia Britannica* 201–203, 230 (15th ed. 1986); *Van Nostrand's Scientific Encyclopedia* 1193–97 (6th ed. 1983). Thus, the divergence between anchovies and sardines comes at the Family stage, rather late in the taxonomic progression. Moreover, there apparently exists some disagreement among scientific authorities on many aspects of classification of the *Clupeiformes* order. *See 19 Encyclopaedia Britannica, supra,* at 226.

Nevertheless, as the parties have agreed upon the existence of a scientific distinction between anchovies and sardines, the Court accepts this distinction as established. The question remains, however, as to the significance of the distinction, for the plaintiff must show that the scientific meanings of these two terms are the same as their common and commercial meanings, *i.e.* that the distinction between the families *Engraulidae* and *Clupeidae* forms a basis upon which sardines and anchovies are distinguished in common parlance and commerce.

In support of its contention that the scientific meanings of "anchovies" and "sardines" are the same as the common and commercial meanings, the plaintiff offers excerpts from several dictionaries. For example, it offers the following from the *Random House* definitions of "anchovy":

> * * * any small, marine, herring like fish of the family *Engraulidae* * * * often preserved in oil and used in salads, spreads, etc. * * *.

and of "sardine":

> * * * 2. Any of various similar, closely related fishes of the herring family *Clupeidae* * * *.

Plaintiff also quotes from the *Webster's* definitions of "anchovy":

> * * * any of a number of small herring like fishes (family *Engraulidae*); * * *.

and of "sardine":

> * * * any of several small or immature *Clupeidae* fishes. * * *

In addition to these lexicographic sources, plaintiff offers similar excerpts from the *Summaries of Tariff Information* of 1929 and 1948. It also cites portions of the F.D.A.'s *Requirements of Laws and Regulations Enforced by the U.S. Food and Drug Administration.*

Page 29 of these *Requirements* contains the following statement concerning anchovies:

> *Anchovies.* Products represented as anchovies should consist of fish of the family *Engraulidae.* Other small fish, such as small herring and herring-like fish which may superificially resemble anchovies cannot properly be labelled as anchovies.
>
> * * * * * * *

and also this statement regarding sardines:

> *Sardines.* The term "sardines" is permitted in the labelling of the canned products prepared from small-size *Clupeoid* fish
>
> * * * * * * *

Plaintiff concludes that because these sources use the *Engraulidae-Clupeidae* framework, this framework constitutes the basis for distinguishing between anchovies and sardines in commerce and common usage. In response to plaintiff's lexicographic citations, the government presents authorities of its own to support its contention that in the common and commercial usage controlling for customs purposes, the term "sardines" includes merchandise of the kind at issue here. A more extensive excerpt from *Webster's* definition of "sardine" than that provided by plaintiff reads as follows:

> **sardine** * * * **1a:** any of several small or immature clupeid fishes: (1): the young of the European pilchard (*Sardinia pilchardus)* when of a size suitable for preserving for food (2): any of various similar young of closely related fishes (as *Sardinops caerulea* of the Pacific coast of No. America, Sardinella anchovia of the tropical Atlantic and Caribbean area or *Sardinia neopilchardus* of Australia and New Zealand) (3): *any of various small or immature herrings that resemble or are used similarly to the true sardines*—compare Brisling, Sild **b:** a similar but more distantly related fish (*as an anchovy*)—not used technically and in some jurisdictions not legally acceptable without a qualifying term * * *

(Emphasis added). *Webster's Third New International Dictionary* (1981).

This definition includes within the meaning of "sardine" both "small or immature herrings" that "resemble or are used similarly to" true sardines, and other fish "(as an anchovy)" that are similar to true sardines, even if "more distantly related".

Because the controlling meaning of a descriptive tariff term is the meaning which was accepted at the time the particular provision(s) were enacted, *Goldsmith's Sons* v. *United States,* 13 Ct. Cust. App 69 (1925); *United States* v. *Belgam Corp.,* 22 CCPA 402 (1934), more weight should be given to definitional sources existing closer to that time. The 1954 edition of *Webster's* contains a definition of "sardine" similar in most respects to the one contained in the 1981 edition:

> **sardine,** n. **1.** The young of pilchard (*Sardinia pilchardus*) when of a size suitable for preserving in oil or tomato sauce for food; also, *any of certain closely related and similar species.* The *true* sardine occurs only in European waters, but others are found in America, as *S. caerulea* of the Pacific coast and *S. anchovia* of the West Indies. **2.** *Any of the various small or immature fishes resembling the true sardines or similarly preserved for food;* as: **a** In the eastern United States, the young of the common herring or of the menhaden. **b** In North Carolina, *an anchovy* (*Anchoviella epsetus*).

(Emphasis added).

Thus, in this earlier source also there are included within the sardine category, along with "true" sardines, other "closely related and similar species", and other fishes which are "small or immature", "resembling the true sardines or similary preserved for food", including, some cases, "an anchovy". In the 1956 edition of *Funk & Wagnall's New Standard Dictionary of the English Language,* "sardine" is similarly defined as,

> 1. One of the various small clupeioid fishes *preserved in oil* * * *
>
> 2. The young of herring, menhaden or some like fish *similarly prepared.*
>
> 3. [Local, U.S.] * * *
>
> (2) *An anchovy* * * *

(Emphasis added).

The 1963 edition of the *Columbia Encyclopedia* (3d Ed. 1963) does not define "anchovy" and "sardine" separately, but instead groups them both under the entry for *herring.* This source, moreover, states,

> The name sardine is also applied to various small fish packed with oil or sauce in flat cans * * *

Id. at 943.

The government derives from these sources its asserted common meaning of "sardine" as a category of fish which includes, in addition to "true" sardines, a wide variety of fishes that are similar or related to true sardines, including herring-like fishes such as anchovies, and especially these types of fishes when they are prepared or preserved as food in oils or sauces, and packaged in small flat cans.

The sources cited by the government are persuasive support for the common meaning of "sardine" used by Customs in the present classification.

Regarding the *Summaries of Tariff Information,* cited by both parties, the Court here notes and adheres to prior opinions of this and preceding courts discounting the value of this source in interpreting the language of the tariff acts. In *Volkswagen of America, Inc.* v. *United States,* 68 Cust. Ct. 122. C.D. 4348, 340 F. Supp. 983

(1972), the Customs Court, per Judges Watson, Maletz, and Re, wrote,

> The Summaries of Tariff Information are of no use as a guide to the scope of provisions or legislative intent in *prior* tariff acts.

Id. at 128, 340 F. Supp. at 987 (emphasis in original).[1]

In the instant case, plaintiff refers to the 1948 *Summary* in interpreting the 1930 Tariff Act, and to the 1929 *Summary* in interpreting the 1922 Tariff Act. Under the cases mentioned above, these references to *Summaries* published *subsequent* to the respective tariff acts, and by non-legislative authorities, can not change any conclusions reached in this case by reliance on other sources.

Finally, plaintiff's reference to the *F.D.A. Requirements* is not persuasive. With regard to anchovies, these *Requirements* state only that products represented as anchovies should consist of fish from the *Engraulidae* family. This provision says nothing about what may be represented as *sardines*, nor about other ways in which anchovies may be represented; it only establishes a requirement for products represented as *anchovies,* thus excluding the merchandise at issue here. Moreover, regarding sardines, the *Requirements* merely state that the term "sardine" is *permitted* to be used in the labelling of *canned* products *prepared from* the *Clupeioid* family, not that this label may *only* be used for fish from this family. In any event, the value for interpreting the tariff acts of "requirements" for use in interpreting FDA statutes is questionable. The *Requirements* themselves in the Foreword state,

> This publication does not take the place of either the law or regulations [administered by the F.D.A.]. Rather, it aims to be a useful cross-reference to their major requirements, by summarizing all statutes now administered by FDA. It is intended mainly as an aid to understanding the Federal Food, Drug, and Cosmetic Act of 1938, as amended.

As with the *Summaries of Tariff Information,* the *FDA Requirements* can not alter conclusions reached upon the basis of other, more appropriate sources.

Under *Jarvis Clark Co.,* 733 F.2d 873 (Fed. Cir. 1984), this Court, in classification cases, not only must decide the correctness of the plaintiff's proposed classification, but also must decide the correctness of the government's classification, "both independently and in comparison with the importer's alternative." *Id.* at 878. The Court in *Jarvis* stated further,

> The importer still has the burden of establishing that the government's classification is wrong. Ordinarily it will be difficult to meet this burden of proof without proposing a better classification. But the trial court cannot determine the correct

[1] *See also Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, C.D. 4783, 468 F. Supp. 1318 (1979).

result simply by dismissing the importer's alternative as incorrect.

It is clear from this, and the Court of Appeals there recognized, that *Jarvis* does not displace the presumptions of correctness in favor of the government's classification; rather, it requires a finding that, for some reason other than the insufficiency of plaintiff's alternative classification, the presumption of correctness is justified in this particular case. As noted, *supra,* Customs' classification decisions, including all subsidiary supporting findings necessary thereto, are presumed to be correct unless the plaintiff proves that they are wrong.

There is ample evidence supporting the government's classification of the merchandise in this case. The authorities referred to herein convincingly establish a common and commercial meaning of the term "sardine" which includes the plaintiff's product. The common meaning of a tariff term is not a question of fact but a question of law to be decided by the Court. *United States* v. *Florea & Co.,* 25 CCPA 292 (1938); *United States* v. *National Carloading Corp.,* 48 CCPA 70, C.A.D. 767 (1961). This Court finds that for purposes of classifying plaintiff's product, the common meaning of "sardine" is that claimed by the government.

Moreover, the commercial meaning of a tariff term, controlling for classification purposes, is presumed to be the same as its common meaning, absent proof to the contrary. *See Meyer & Lange* v. *United States, supra.* The plaintiff in this case, far from proving a commercial meaning of "sardine" different from the government's asserted common meaning, has in fact *adopted* this common meaning in its commercial practices of labelling, marketing, and selling this merchandise, uniformly, as "sardines".

The plaintiff argues that classification of its products as sardines would render meaningless the tariff term "anchovies". But this is a *non-sequitur.* While expressing no formal opinion on the matter, the Court notes that at least one possible application of this term in tariff usage could be for imported merchandise *labelled and marketed* as "anchovies". The present merchandise falls within the common and commercial meanings of "sardine". For whatever reason, the plaintiff chose to label and market the merchandise as "sardines". It would therefore defy logic for the Court to now reclassify the merchandise as "anchovies".

Conclusion

A common and commercial meaning of "sardine" that includes the product at issue having been established, and the plaintiff by its own business practices having manifested an acceptance of this meaning the classification of plaintiff's product by the Customs Service, in reliance on this meaning, as "sardines" is hereby upheld.

(Slip Op. 89-124)

ALLIED TUBE & CONDUIT CORP., SAWHILL DIV., CYCLOPS CORP., AND WHEATLAND TUBE CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND THE ROYAL THAI GOVERNMENT, SAHA THAI STEEL PIPE CO., LTD., SIAM STEEL PIPE IMPORT-EXPORT CO., LTD., THAI HONG STEEL PIPE CO., LTD., AND THAI UNION STEEL CO., LTD. DEFENDANT-INTERVENORS

Court No. 89-06-00353

[Plaintiffs, application for access to confidential verification exhibits under administrative protective order is granted; Defendant-intervenors' application for a stay pending appeal is denied.]

(Decided August 31, 1989)

Schagrin Associates, (Roger B. Schagrin, Paul W. Jameson and *Mark C. Del Bianco)* for the plaintiffs.

Stuart E. Schiffer Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis, Jane E. Meehan* and *Leila Afzal*); *Ann White*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for the defendant.

Willkie, Farr & Gallagher, (Arthur J. Lafave III and *Daniel L. Porter)* for the defendant-intervenors.

OPINION AND ORDER

CARMAN, *Judge:* Plaintiffs Allied Tube and Conduit Corp., Sawhill Div., Cyclops Corp., and Wheatland Tube Co. (plaintiffs) contest the denial by the Department of Commerce, International Trade Administration (Commerce), of their request for release of confidential business priorietary information contained in documents utilized by Commerce for verification of questionnaire responses in the administrative review (for 1987) of the countervailing duty order in *Circular Welded Carbon Steel Pipes and Tubes From Thailand* (Inv. No. C-549-501). Plaintiffs seek an order from this Court, pursuant to section 777(c) of the Tariff Act of 1930 (the Act) as amended, compelling Commerce to release the confidential information to plaintiffs under an administrative protective order. 19 U.S.C. § 1677f(c) (1982) *as amended by* the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1332(3), 102 Stat. 1107, 1208-09 (1988) (the 1988 Act). This Court has jurisdiction pursuant to 28 U.S.C. § 1581(f) (1982).[1]

Commerce opposes this action arguing that the information should not be disclosed due to its sensitive and highly confidential nature. Defendant's Memorandum In Opposition To Plaintiffs' Motion For Release Of Confidential Information to Plaintiffs Counsel Pursuant To A Judicial Protective Order at 3-4.[2] Defendant-inter-

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[1]28 U.S.C. § 1581(f) states:

> The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

[2]Commerce did not file a brief concerning the merits of its opposition to plaintiffs' claim. The Court was apprised of Commerce's position at oral argument held on August 16, 1989 and through its brief in opposition to

Continued

venors (intervenors), citing legislative history, claim that verification documents do not fall within the scope of section 777 of the Act, and are *per se* exempt from disclosure under the Act. Alternatively, intervenors argue that even if verification exhibits are within the scope of the disclosure provisions of section 777, there is a clear and compelling need to withhold disclosure in this case. *See* Intervenors' Opposition To Plaintiffs' Application For Access To Confidential Information Under Protective Order (Intervenors' Brief).

On the basis of the papers submitted, the Court's examination of the documents *in camera*, the arguments of the parties and a careful reading of the relevant statutes, this Court grants plaintiffs' application except for items redacted by agreement of the parties. This Court finds that under the statute and in accordance with *Bethlehem Steel Corp.* v. *United States*, 13 CIT ——, Slip Op. 89–105 (July 25, 1989) verification exhibits as a class are not exempt from disclosure under section 777(c) and that Commerce has failed to show a clear and compelling need to withhold disclosure of the verification exhibits in question as mandated under the statute. Further, this Court finds that intervenors have failed to meet the requirements for a stay of this Court's order pending appeal.

BACKGROUND

Plaintiffs, interested parties to Commerce's administrative review of the 1987 period of the countervailing duty order concerning *Circular Welded Carbon Steel Pipes and Tubes From Thailand*, filed several requests for release of business proprietary information pursuant to 19 U.S.C. 1677f(c)(1). *See* Complaint, Exhibits 2 and 5. These requests encompassed questionnaire responses and verification reports. Commerce subsequently released the questionnaire responses to plaintiffs under the extant administrative protective order, but refused to release verification exhibits. *Id.*, Exhibits 1 and 3. By letter dated June 12, 1989, Commerce provided a specific denial of plaintiffs' request for release of verification exhibits and the reasons for its denial. Letter from Paul McGarr, Program Manager, Office of Countervailing Compliance, Complaint, Exhibit 1.

The letter stated the "1988 Act contains no specific reference to the release of verification exhibits and, therefore, there is no specific mandate to release verification exhibits." *Id.* at 2. Continuing, the letter outlined Commerce's position:

> We believe there is a clear and compelling need to withhold release of verification exhibits. Verification exhibits merely corroborate the information presented in the response. Verification exhibits, such as sales ledgers, often contain sensitive price and sales information for products not under review. Disclosing such data might cause substantial harm to respondents by re-

plaintiffs' motion for release of the confidential information under a judicial protective order. The Court notes that due to the dispositive nature of this opinion, plaintiffs' motion for a judicial protective order has become moot.

> vealing important company pricing and marketing decisions to competitors, thus providing them with an unfair and unnecessary competitive advantage. Further, verification exhibits consist of internal business records that go to the heart of daily business transactions that are extremely sensitive to a company's operations. Release of such documents would be viewed by cooperative respondents as a breach of trust and would severely impair our ability to gather such documents in the future. Finally, applicants have access to all the information necessary to comment on, and participate in, the review without access to the underlying substantiating documents.

Id. Subsequent to plaintiffs' initiation of this action, the verification documents in question were transmitted to this Court under seal pursuant to 28 U.S.C. § 2635(c) enabling this Court to examine the documents *in camera.*[3]

A hearing for all purposes was held before this Court on August 16, 1989, at which time legal arguments were made but no evidence whatsoever was offered. At the close of the hearing this Court found that Congress intended for business proprietary information contained within the verification exhibits to be subject to disclosure under the statute. Additionally, this Court found that Commerce had failed to offer evidence showing a clear and compelling reason for withholding disclosure of any of the contested documents. Transcript of Hearing on August 16, 1989 (Tr.) at 67–68.

Upon the consent of all parties, the Court ordered Commerce, in consultation with intervenors, to review the documents and to return to open Court with copies of the proposed redactions of customer and supplier names highlighted for this Court's *in camera* review.[4] The parties reconvened before this Court on August 22, 1989 at which time Commerce agreed to transfer the proposed redactions to the documents in the Court's record under seal. At that time argument was heard on intervenors' motion for a stay of the Court's order in this case pending appeal.[5]

CONTENTIONS OF THE PARTIES

Plaintiffs argue that the statute requires Commerce to release under protective order "*all*" business proprietary information contained within the record, including verification exhibits, subject to a

[3]Section 2635(c) of title 28 of the United States Code, provides in pertinent part:

> Within fifteen days, * * * after service of a summons and complaint in a civil action involving an application for an order directing the administering authority * * * to make confidential information available under section 777(c)(2) of the Tariff Act of 1930, the administering authority * * * shall transmit under seal to the clerk of the Court of International Trade, as prescribed by its rules, the confidential information involved, together with pertinent parts of the record. Such information shall be accompanied by a nonconfidential description of the nature of the information being transmitted. The confidential status of such information shall be preserved in the civil action, but the court may examine the confidential information in camera and may such information available under a protective order consistent with section 777(c)(2) of the Tariff Act of 1930.

28 U.S.C. § 2635(c) (1982).

[4]The Court also notified Commerce that upon the return date, it would hear any additional evidence showing clear and compelling reasons to withhold disclosure since certain parts of the documents were in the Thai language. Tr. at 68–69. On that date Commerce declined to present further evidence concerning those documents.

[5]At the August 22, 1989 hearing, the parties also agreed to the redaction of any notes on the documents made by Commerce case analysts.

limited exception for information which Commerce can demonstrate a clear and compelling need to withhold. Memorandum In Support of Plaintiffs' Application For Access To Confidential Information Under Protective Order at 5. At the hearing plaintiffs maintained that neither Commerce nor intervenors presented any evidence or persuasive argument showing a clear and compelling need to withhold disclosure. Tr. at 65. At the close of the hearing, plaintiffs consented to the redaction of customer and supplier names. *Id.*

Commerce originally appeared to press the argument that all verification exhibits should be exempt from disclosure due to their inherently sensitive nature and allegedly tenuous relevance to interested parties' participation in the proceedings. However, at the hearing the government conceded that Commerce was reformulating its position in light of this Court's ruling in *Bethlehem Steel,* 13 CIT ——, Slip Op. 89–105, and that it was withdrawing the argument that all verification exhibits should be exempt from the mandates of section 777(c). Tr. at 38. Instead, Commerce pressed the argument that disclosure should be withheld for documents containing (1) customer and supplier names, and (2) information pertaining to products and producers not under investigation. Tr. at 52–54.[6]

The intervenors claim that a longstanding agency practice of exempting verification exhibits from disclosure, and the legislative history, support the position that Congress did not intend its amendment of section 777 of the Act to include verification exhibits within its scope.

Alternatively, intervenors contend that even if the verification exhibits, (all of which were submitted by intervenors to Commerce), were found to be subject to section 777, there is a clear and compelling need to exempt them from disclosure under the statute. Intervenors point to three types of information contained within the verification exhibits it believes should be withheld from disclosure: (1) confidential internal Thai government documents; (2) foreign government documents covered by foreign secrecy laws; and (3) customer and supplier names.

Discussion

Judicial review in this Court of an administrative agency's denial of a request for access to confidential information under 19 U.S.C. § 1581(f) is evaluated *de novo* on the basis of the record before the Court. *See, Bethlehem Steel,* 13 CIT at ——, Slip Op. 89–105 at 3 (and citations therein).

"The starting point in every case involving construction of a statute is the language itself." *Madison Galleries, Ltd.* v. *United States,* 870 F.2d 627, 629, (Fed. Cir. 1989) (citing, *Bethesda Hosp. Ass'n* v. *Bowen,* 108 S.Ct 1255, 1258 (1988); *United States* v. *Turkette,* 452 U.S. 576, 580 (1981); *Watt* v. *Alaska,* 451 U.S. 259, 265 (1981)). Ab-

[6]At the first hearing in this case Commerce conceded that all of the documents in question contained business proprietary information. Tr. at 48–50.

sent a clear cut legislative intent contrary to the statutory language, the statutory language is ordinarily regarded as conclusive. *Id.*

Disclosure of business proprietary information before the administrative agency is governed by section 777(c) of the Tariff Act of 1930, recently amended by the Omnibus Trade and Competitiveness Act of 1988. 19 U.S.C. § 1677f(c); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1332(3), 102 Stat. 1107, 1208–09 (1988). Subsection c, entitled "Limited disclosure of certain proprietary information under protective order," provides in relevant part as follows:

> (1) Disclosure by administering authority of Commission:
>
> (A) In general:
>
> Upon receipt of an application (before or after receipt of the information requested) which describes in general terms the information requested and sets for the reasons for the request, the administering authority or the Commission shall make *all* business proprietary information presented to, or obtained by it, during a proceeding (*except* privileged information, classified information, and *specific information of a type for which there is a clear and compelling need to withhold from disclosure*) available to interested parties who are parties to the proceeding under a protective order * * * regardless of when the information is submitted during a proceeding.
>
> * * * * * * *
>
> (2) Disclosure under court order.
>
> If the administering authority denies a request for information, * * * then application may be made to the United States Customs Court for an order directing the administering authority * * * to make the information available. After notification of all parties to the investigation and after an opportunity for a hearing on the record, the court may issue an order, under such conditions as the court deems appropriate, which shall not have the effect of stopping or suspending the investigation, directing the administering authority * * * to make all or a portion of the requested information described in the preceding sentence available under a protective order and setting forth sanctions for violation of such order if the court finds that, under the standards applicable in proceedings of the court, such an order is warranted and that—
>
> (A) the administering authority * * * has denied access to the information under subsection (b)(1) of this section,
>
> (B) the person on whose behalf the information is requested is an interested party who is a party to the investigation in connection with which the information was obtained or developed, and

(C) the party which submitted the information to which the request relates has been notified, in advance of the hearing, of the request made under this section and of its right to appear and be heard.

19 U.S.C. § 1677f(c), *as amended* by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1332(3), 102 Stat. 1107, 1208–09 (1988) (emphasis added).

On its face, this statute requires that the administering authority "shall make *all* business proprietary information * * * available to interested parties, * * *" upon proper request. *Id.* (emphasis added). It is clear that the statute specifically imposes a duty of disclosure upon the administering agency, unless the agency can meet the exception for "privileged information, classified information, and specific information of a type for which there is a clear and compelling need to withhold from disclosure." *Id.*; *see Komatsu Forklift Mfg. Co. of U.S.A.* v. *United States,* 13 CIT at ——, Slip Op. 89–97 (July 11, 1989) at 9.

I. Verification Exhibits:

In *Bethlehem Steel,* Judge DiCarlo roundly rejected intervenors' arguments that verification exhibits should be exempt from disclosure *per se,* under 19 U.S.C. § 1677f(c). 13 CIT at ——, Slip Op. 89–105 at 4–5. In that case, the government argued, (as Commerce did here at the administrative level below), that all verification exhibits should be exempt from disclosure because by their very nature they are comprised of extremely sensitive confidential information which may concern the very heart of a company's internal operating procedures and practices. *Id.* Rejecting this argument, the Court stated "there is no support for categorical denials of access to documents without a proper analysis of whether the documents are privileged or classified, or whether there is a clear and compelling need to withhold disclosure." 13 CIT at ——, Slip Op. 89–105 at 5.[7]

The legislative history of the 1988 amendments to section 777(c), while of limited utility to this Court, is supportive of this interpretation of the statute based on a reading of its plain language. The House Conference Report supporting the bill provided: "the general rule is that business proprietary information shall be subject to disclosure under administrative protective order; the exceptions authorized are intended to be very narrow and limited exceptions." H.R. Conf. Rep. No. 576, 100th Cong., 2nd Sess. 623 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 1656. The Conference Report stated that the exception for information for which there is a "clear and compelling need to withhold from disclosure" "is expected to be used rarely, in situations in which substantial and ir-

[7]Intervenors argue that *Bethlehem Steel* is not dispositive of this case on this issue because it arose in the context of an antidumping proceeding not a countervailing duty one as herein. Intervenors also claim that *Bethlehem Steel* does not apply because the Court did not pass judgment on whether confidential verification documents provided by a foreign government in a countervailing duty investigation must be disclosed under section 777. This Court has examined these arguments and finds them to be meritless.

reparable financial or physical harm may result from disclosure." *Id.*

Intervenors proffer the argument that prior to the 1988 Act amendments to the Tariff Act of 1930, Commerce had a consistent practice of declining to disclose confidential verification documents under administrative protective order, and the Congress did not intend to overturn the practice. Intervenors' Brief at 7, 11; Tr. at 30.[8] Intervenors maintain that "[i]n amending Section 777(c), there is no evidence that Congress specifically intended to include confidential verification documents within its scope." Intervenors' Brief at 13. From this assertion intervenors would have this Court read the statute, contrary to its plain meaning, to exclude all verification documents.

It is clear to this Court that if Congress had intended to exclude verification documents from the scope of the statute it could easily have so provided in the plain language of the statute. This Court declines to look beyond the plain meaning of the statutory language and holds in accordance with *Bethlehem Steel* that verification documents are subject to disclosure under section 777(c) unless there is a showing made of a clear and compelling need to withhold disclosure.

II. Clear and Compelling Need:

Section 777 clearly imposes the burden of proof upon the administering agency to show that the documents are privileged, classified or "specific information of the type for which there is a clear and compelling need to withhold from disclosure." 19 U.S.C. § 1677f(c)(2); *Bethlehem Steel* 13 CIT at ——, Slip Op. 89–105 at 4. The statute also allows the party submitting the documents, in this case defendant-intervenors, an opportunity to be heard. 19 U.S.C. § 1677f(c)(2)(C).

The Court notes that there was no testimony or documentary material offered as evidence at either of the hearings on this matter. The only matters heard by the Court were the arguments of the attorneys over questions of the legal interpretation of the statute.[9]

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[8]Intervenors also raise the issue of international comity between the sovereign governments of Thailand and the United States to support its position that confidential foreign government verification documents should not be disclosed. Intervenors argue that it would be a breach of trust and detrimental to future countervailing duty investigations to compel disclosure of the documents, even under a protective order, over the objection of the Royal Thai government. Intervenors' Brief at 21; Tr. at 34.

The Court notes that the Royal Thai government will not be compelled to consent to the release of the business proprietary information contained within the verification documents. The statute allows for the party submitting the documents to withdraw them should the administering agency determine that they are subject to disclosure. See 19 U.S.C. 1677f(c)(1)(E); 19 C.F.R. § 355.20(a)(4) (1988).

[9]At the August 16, 1989 hearing, Commerce expressed that it was primarily concerned that it had promised the Thai government it would not allow disclosure of the verification exhibits. The following colloquy took place:

> Ms. Meehan: Your Honor, perhaps I could go over a bit of a history of this case.
>
> When the investigation was initiated and verification took place, it was Commerce's policy not to release under APO [administrative protective order] any verification exhibits. Our position was that there was a clear and compelling need to withhold such documents due to their highly confidential nature and they [sic] essentially substantiate [sic] function. We received the documents from the Thai Government and from the respondents with assurances they would not be released under APO because it was our policy, * * * that's how we got the documents. After the plaintiffs filed this action challenging Commerce's denial of access to the exhibits under APO, the case of Bethlehem Steel arose.
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> * * * * * * *

Continued

Commerce and the intervenors argued to this Court that in this case the clear and compelling need to withhold disclosure of the verification exhibits was an entirely legal question.

A. Non-Subject Producers and Product Information:

Commerce argued that information relating to producers and products not under investigation should not be disclosed due to its highly confidential nature and irrelevancy to the investigation. Tr. at 46, 50–51. This same argument was rejected by the Court in *Bethlehem Steel* where Judge DiCarlo found that

> a general objection on the grounds of relevancy to the investigation did not rise to a clear and compelling need to adopt a categorical rule against disclosure of verification documents. The possibility that exhibits may contain information on other products in addition to products under investigation is an insufficient basis to support a general rule against disclosure. If the Court were to adopt a contrary rule, a foreign producer could always prevent disclosure of exhibits merely by submitting documents which contained data for irrelevant products.

13 CIT at ——, Slip Op. 89–105 at 6. While *Bethlehem Steel* arose in the context of an antidumping investigation, the same rationale holds true for countervailing duty investigations. Additionally, this Court has serious difficulty with Commerce's argument that the information sought would be irrelevant in a countervailing duty investigation when issues such as the general availability and industry specificity of the alleged subsidies may be of central importance. *See generally,* 19 U.S.C. § 1677(5)(B).

As to the highly confidential nature of the information, the statute does not exempt information upon such a showing alone. Congress has provided safeguards against unauthorized disclosures of the information which include administrative protective orders as well as any additional sanctions as this Court may order. *See* 19 U.S.C. § 1677f(c)(2) *as amended* by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1332(3), 102 Stat. 1107, 1208–09 (1988). As this Court in *Komatsu Forklift Mfg. Co.* stated, "[t]he mere possibility that information could be inadvertently disclosed under an [administrative protective order] is not enough to overcome the statutory policy favoring disclosure." 13 CIT at ——, Slip Op. 89–97 at 9.

> THE COURT: At this juncture I am hearing from you that the clear and compelling reason why these materials should not be disclosed to the plaintiffs in this case is that the Government has made a representation to the Government of Thailand and has made a representation to the various companies involved that they would not be disclosed, and that seems to be what you are saying to me is the only reason; is that correct?
>
> MS. MEEHAN: That's the reason why we have not given them out already under APO.

Tr. at 37, 40–41.

B. Documents Governed by Foreign Secrecy Laws or Confidentiality Rules.

Intervenors argue there is a clear and compelling need to prevent disclosure of confidential foreign government documents and foreign government documents by foreign secrecy laws. Intervenors' Brief at 27. In addition to the argument that the doctrine of international comity between sovereign states should preclude disclosure of foreign government documents, intervenors claim that disclsoure would result in the "widespread dissemination" to private parties in the United States of internal Thai government documents through the routine disclosure to the attorneys, staffs and consultants under an administrative protective order. Tr. at 35. Intervenors seem to be concerned that internal Thai government policies and procedures will thereby become known to private parties in the United States.

However, the intervenors did not introduce any evidence or offer any proof as to how these concerns rise to the level of clear and compelling need to withhold disclosure. Nor did intervenors introduce any evidence as to the nature of the Thai security laws. Furthermore, this Court notes that Congress has provided the Thai or any other government the opportunity to prevent disclosure of any of the documents. Under 19 U.S.C. § 1677f(c)(1)(E) and the corresponding regulations, the party submitting business proprietary information must be given the opportunity by the administering agency to withdraw the documents upon notification that they will be released under a protective order. 19 C.F.R. § 355.20(a)(4) (1988). The possibility that the decision to withdraw the documents may result in the administering agency utilizing the best information available exhibits Congress' awareness that sovereign nations must be allowed some control over their participation in countervailing duty investigations.

C. Customer and Supplier Names.

Commerce and intervenors also argued that customer and supplier names should be withheld from disclosure under the statute. Tr. at 28, 45; Intervenors' Brief at 30. Though it appears that customer and supplier names may be exempted from disclosure in certain, if not all circumstances under section 777, this Court need not reach this issue since all the parties agreed to their redaction from the documents. *See Bethlehem Steel* 13 CIT at ——, Slip Op. 89–105 at 7.

III. Stay Application

At the second hearing in this case on August 22, 1989 the intervenors moved for a stay of this Court's Order pending appeal. Intervenors claim that without the imposition of a stay pending appeal the issues would become moot and thus deprive them of full appellate review. Memorandum Of Points And Authorities In Support Of Defendant-Intervenors' Motion For Stay Pending Appeal at 5.

The standard for determining whether this Court should grant a stay is similar to the standard for granting a preliminary injunction. *Fundicao Typy S.A.* v. *United States,* 12 CIT ——, 696 F. Supp. 1525 (1988); *Philipp Brothers Inc.* v. *United States,* 10 CIT 448, 640 F. Supp. 261 (1986); *American Grape Growers* v. *United States,* 9 CIT 505 (1985). It is appropriate to grant the stay when the movant establishes: (1) immediate and irreparable harm will result in the absence of the stay; (2) a likelihood of success on the merits; (3) the issuance of a stay will not substantially harm other parties interested in the proceeding, and; (4) the public interest would be better served by granting the stay. A failure to establish any one of the criteria precludes granting the application. *S.J. Stile Assocs., Ltd.* v. *Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981).

This Court determines that the intervenors have not made a sufficient showing that immediate and irreparable harm will befall them in the absence of this Court's issuance of a stay. There has been no showing that the sanctions imposed for violation of the protective order will be anything but sufficient to maintain confidentiality. The possibility of inadvertent disclosure of the information to unauthorized third parties has not been shown to rise to the level of immediate irreparable harm. Furthermore, if a party wishes to withdraw the material, as shown above, that relief is available administratively.

Congress has expressed its intent that these proceedings should proceed with expedition. This Court is of the opinion a stay would unnecessarily delay these proceedings. Nevertheless, the Order implementing this opinion will be made effective eleven (11) days from the date of this opinion, to permit any of the parties to make any application to the Court of Appeals for the Federal Circuit they deem appropriate.

CONCLUSION

On the basis of the foregoing, plaintiffs' application for an order affirming their right to access to the verification exhibits and directing the International Trade Administration to grant them such access under an administrative protective order is granted, except as to portions of the documents the parties have agreed to redact. This Court holds that there has been no showing that verification exhibits are exempt from the mandates of 19 U.S.C. 1677f and no showing that there is a clear and compelling need to withhold disclosure of any of the documents. The Department of Commerce, International Trade Administration, is directed to release to plaintiffs the confidential business proprietary information utilized by Commerce for verification of the questionnaire responses in the administrative review for 1987 of the countervailing duty order in *Circular Welded Carbon Steel Pipes and Tubes From Thailand* (Inv. No. C–549–501). The intervenors' motion for a stay of this order is denied.

(Slip Op. 89–125)

BOMONT INDUSTRIES, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASAHI CHEMICAL INDUSTRY CO., LTD., INTERVENOR-DEFENDANT

Court No. 86–05–00557

MEMORANDUM AND ORDER

[Defendant's motion for rehearing and stay granted in part and denied in part.]

(Dated September 7, 1989)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen* and *Lane S. Hurewitz*) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Platte B. Moring, III*); and *Tina Stikas*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel; for the defendant.

Barnes, Richardson & Colburn (*James S. O'Kelly, Matthew T. McGrath* and *Jack M. Simmons, III*) for the intervenor-defendant.

AQUILINO, *Judge:* In this action, the court has granted in part and denied in part plaintiff's motion for judgment on the agency record per slip op. 89–94, 13 CIT ——, —— F. Supp. ——, (June 30, 1989). Pursuant thereto, the matter was ordered remanded to the International Trade Administration, U.S. Department of Commerce ("ITA") for further proceedings not inconsistent with the opinion as to alleged transshipments of the merchandise under consideration. Otherwise, the agency's final negative dumping determination reported at 51 Fed. Reg. 15,816 (April 28, 1986) was affirmed.

The defendant has responded with a Motion for Rehearing and Stay[1], which has been joined in support by the intervenor-defendant.

Familiarity with slip op. 89–94 is presumed, but recitation herein of the context containing the statement challenged by defendant's motion might be illuminating, to wit:

> Part II of the petition set forth at length "information concerning nylon impression fabric produced by or for Asahi or sold by Shirasaki transshipped through Canada and West Germany to the United States". R.Doc 1 at 49, para. 1. *See generally id.*, pp. 49–85. In the notice of initiation of its investigation, the ITA referred specifically to the allegations of transshipment in finding that the petition met the requirements of 19 U.S.C. § 1673a. *See* 50 Fed.Reg. at 28,112. Apparently, during the course of the ensuing proceedings, the petitioners pressed the ITA to investigate the alleged transshipments for sales at less than fair value. The agency's stated, final position on this point is as follows:
>
>> We disagree. Counsel for petitioners did not provide substantiation of any kind that imports of linked nylon impression fabric from West Germany originated in Japan.

[1]In the interest of orderly proceedings, the court has granted a stay of the remand order, pending resolution of the request for rehearing.

> To the contrary, we verified that Shirasaki did not export any of this product to West Germany. Asahi, in its response, provided affidavits from the West German importer and its purchasers, two companies which ink and distribute the Asahi merchandise, that the Japanese fabric is inked and resold to the ultimate user in Europe. Further, this investigation, as requested in the petition, covers only uninked nylon impression fabric. There were no imports of this product from West Germany during the period of investigation. 51 Fed.Reg. at 15,819.

Counsel for the defendant now admit that the foregoing assertion of no imports of this product from West Germany during the period of investigation was in error, but they argue that

> it is clear from the record that the agency meant to say that there were no *transshipped* imports of uninked impression fabric from West Germany.

The intervenor-defendant argues that the ITA Report of Investigation of Asahi in Osaka, Japan

> clearly indicates at page 5 that the Department verified reported sales to West Germany during the period of investigation as set forth in Asahi's questionnaire answer. The fact that the verification report did not refer specifically to "transshipments" does not indicate that the Department failed to verify Asahi's sales to third country markets.[2]

In line with this discussion and review of the administrative record, the court concluded that the ITA had failed to verify on its own, as required by 19 U.S.C. § 1677e(a) (1984), the allegations of transshipment. Defendant's motion contests the court's statement, *supra,* that the ITA "referred specifically" to the allegations of transshipment in finding that the petition met the requirements of 19 U.S.C. § 1673a, arguing that no such reference appears in the notice of initiation of the investigation. The intervenor-defendant adds that that "statement, which is factually incorrect, regrettably underlies and fatally taints that entire portion of the Court's opinion."[3]

That part of the ITA's notice of initiation to which the court referred states:

> Petitioners also allege that third country sales to West Germany of nylon impression fabric by Shirasaki are being made at less than the cost of production.
>
> * * * * * * *
>
> Initiation of Investigation.
>
> Under section 732(c) of the Act, we must determine * * * after a petition is filed[ ] whether it sets forth the allegations necessary for the initiation of an anti-dumping duty investigation

[2]Slip op. 89-94 at 10-11 (footnotes omitted, emphasis in original).

[3]Response of Defendant-Intervenor Asahi in Support of Defendant's Motion for Rehearing and Stay [hereinafter referred to as "Intervenor-defendant's Memorandum"], p. 2.

> and whether it contains information reasonably available to the petitioner supporting the allegations.
>
> We examined the petition on nylon impression fabric and found that it meets the requirements of section 732(b) of the Act. Therefore, * * * we are initiating an antidumping duty investigation to determine whether nylon impression fabric from Japan, produced by or for the account of Asahi and Shirasaki, is being or is likely to be, sold in the United States at less than fair value.[4]

Of necessity, in reviewing the administrative record in conjunction with plaintiff's dispositive motion, the court read the lengthy original petition, almost half of which set forth allegations "concerning nylon impression fabric produced by or for Asahi or sold by Shirasaki transshipped through Canada and West Germany to the United States". R.Doc 1 at 49, para. 1. *See generally id.*, pp. 49–85. While the papers of the defendant and intervenor-defendant may now make a point on semantics, any inference that transshipment was not an issue before the ITA is belied by the record. *See, e.g.*, R.Doc 21 at 1 and app. I, § A; R.Doc 24 at para. 5(A); R.Doc 34 at 4–6; R.Doc 35 at 2; R.Doc 37 at 5, annexes 5–1 through 5–4; R.Doc 38 at 2–3; R.Doc 44 at 15–16; R.Doc 47 at 3–4; R.Doc 56 at 20; R.Doc 97 at 11; R.Doc 149 at 77–93; R.Doc 162 at 33–42; and R.Doc 166 at 43–53. *See also Royal Business Machines, Inc.* v. *United States*, 1 CIT 80, 87, 507 F. Supp. 1007, 1014 (1980) ("even if * * * believed * * * to be an 'orange' among 'apples', so long as the Department of Commerce * * * consider[ed] it to belong to a certain class it remained so for the purpose of the proceedings"), *aff'd*, 669 F.2d 692 (CCPA 1982). Indeed, "transshipping" or "transshipment" was also an issue on judicial review and was therefore argued at length in opposition to plaintiff's motion.[5] And it is now the subject of attempted reargument. *See generally* Intervenor-defendant's Memorandum, point III.

Of course, reargument is inherent in a motion of the kind now before the court, but the purpose of a rehearing is not to relitigate. *E.g., Belfont Sales Corp.* v. *United States*, 12 CIT ——, ——, 698 F. Supp. 916, 918 (1988), *aff'd*, 878 F.2d 1413 (Fed. Cir. 1989); *BMT Commodity Corp.* v. *United States*, 11 CIT ——, ——, 674 F. Supp. 868, 869 (1987). Rather, a rehearing is a

> method of rectifying a significant flaw in the conduct o[f] the original proceeding. *W.J. Byrnes & Co.* v. *United States*, 68 Cust.Ct. 358, 358, C.R.D. 72–5 (1972). The exceptional circumstances for granting a motion for rehearing are well established:

---

[4]Dep't of Commerce Int'l Trade Admin., *Nylon Impression Fabric from Japan: Initiation of Antidumping Duty Investigation*, 50 Fed.Reg. 28,111, 28,112 (July 10, 1985).

[5]*See generally* Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record, pp. 33–40; Intervenor Asahi Chemical Industry Co., Ltd.'s Brief in Opposition to Plaintiff Bomont Industries' Motion for Judgment on the Agency Record, pp. 30–38.

(1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available at the time of trial; or (4) an occurrence at trial in the nature of an accident or an unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case.

North Am. Foreign Trading Corp. v. *United States,* 9 CIT 80, 80, 607 F. Supp. 1471, 1473 (1985), *aff'd,* 4 Fed.Cir. (T) 43, 783 F.2d 1031 (1986); *Oak Laminates d/o Oak Materials Group* v. *United States,* 8 CIT 300, 302, 601 F. Supp. 1031, 1033 (1984), *aff'd,* 4 Fed. Cir. (T) 43, 783 F.2d 195 (1986); *V.G. Nahrgang Co.* v. *United States,* 6 CIT 210, 211 (1983). In ruling on a petition for rehearing, a court's previous decision will not be disturbed unless it is "manifestly erroneous." *United States* v. *Gold Mountain Coffee, Ltd.,* 9 CIT 77, 78 (1985); *United States* v. *Gold Mountain Coffee, Ltd.,* 8 CIT 336, 336–37, 601 F. Supp. 212, 214 (1984).

RSI (India) Pvt., Ltd. v. *United States,* 12 CIT ——, ——, 688 F. Supp. 646, 647 (1988).

Whatever the superficial semantical appeal of defendant's motion, it does not begin to approach any of the "exceptional circumstances" discussed in the foregoing case(s). Hence, rehearing must be denied.

(Slip Op. 89–126)

AUREA JEWELRY CREATIONS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–03–00383

For drawback recovery pursuant to 19 U.S.C. § 1313(a), compliance with the record requirements under 19 C.F.R. § 22.4(a) can be established testimonially rather than through the submission of actual documentation.

[Customs' denial of drawback is therefore reversed, and judgment is entered for plaintiff.]

(Decided September 7, 1989)

Barnes, Richardson & Colburn (*Andrew P. Vance* and *Melvin E. Lazar*), for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Mark S. Sochaczewsky*), for defendant.

OPINION

TSOUCALAS, *Judge:* In this action, plaintiff Aurea Jewelry Creations, Inc. (Aurea) protests the decision of the United States Customs Service (Customs) denying drawback, pursuant to 19 U.S.C. § 1313(a) (1982), on 343 gold ingots plaintiff exported from the United States. At issue is whether records missing from the documentation submitted pursuant to 19 C.F.R. § 22.4(a) to establish the ex-

ported gold ingots as manufactured from the imported gold jewelry, may be testimonially established.

BACKGROUND

A. Laws.

Under the relevant drawback statute, 19 U.S.C. § 1313(a), Customs will fully repay, less one percent, the amount of duties paid upon goods previously imported into the United States and used there in the manufacture or production of articles which are subsequently exported. The purpose behind this system of reimbursement is to encourage the production of articles for export, "thus increasing our foreign commerce and aiding domestic industry and labor." *United States* v. *International Paint Co.*, 35 CCPA 87, 90, C.A.D. 376 (1948); *see also United Staters* v. *Nat'l Sugar Refining Co.*, 39 CCPA 96, 99, C.A.D. 470 (1951).

To be eligible for drawback, the claimant must demonstrate compliance with 19 C.F.R. § 22.4(a). This regulation imposes the requirement that the claimant must submit records to Customs showing the following: (1) the date or inclusive dates of manufacture or production; (2) the quantity and identity of the imported duty-paid merchandise used; (3) the quantity and description of the articles manufactured or produced; and (4) the quantity of waste incurred, if any. These prerequisites are intended to screen out fraudulent claims and ensure that exported articles, on which drawback is claimed, were manufactured with duty-paid imported merchandise.

B. This Case.

During the years 1978, 1979, and 1980, Aurea purchased a certain amount of 14-karat gold chains and bracelets from Gori & Zucchi S.A., Aurea's sole supplier and parent company in Italy. Duty was paid upon importation of these articles into the United States. On August 30 and September 30 of 1980, Brink's, Inc. transported a certain amount of Aurea's gold jewelry to JMS Manufacturing Co. (JMS), a wholly-owned subsidiary of Aurea, to be melted and cast into a 14-karat gold ingots. Aurea submitted to Customs a "drawback statement" in which Aurea outlined its plans to melt the imported gold chains and bracelets into 343 14-karat gold ingots and the ensuing exportation of these ingots to Italy. Defendant's Exhibit D. In this "statement," Aurea agreed to maintain manufacturing records in accordance with 19 C.F.R. § 22.4(a).

JMS manufactured the gold ingots pursuant to the plan outlined in Aurea's "drawback statement." These ingots, which were transported back to Aurea under the custody of Brink's, were subsequently exported under Customs supervision.

Customs rejected Aurea's drawback claim on the ground that Aurea failed to maintain records consistent with 19 C.F.R. § 22.4(a) and the "drawback statement." Specifically, Customs found that the documents accompanying the drawback claim did not sufficiently

authenticate Aurea's allegations that the jewelry Brink's delivered from Aurea to JMS was, in fact, the subject imported 14-karat gold chains and bracelets upon which Aurea had previously paid duty. Customs determined that Aurea deficiently documented the dates of manufacture and the manufacturing lot numbers, and therefore may not collect drawback.

Aurea concedes that its drawback claim does not include certain manufacturing records but explains that Aurea could not bring them forward because they were among the documents which were misplaced after JMS went out of business. Aurea contends that the alleged deficiencies in documentation were cured through the testimony of witnesses during trial on February 7, 1989. The questions presented, then, are whether testimonial evidence may be introduced to establish compliance with 19 C.F.R. § 22.4(a), and if so, whether sufficient testimonial evidence exists in this case, establishing a valid claim for drawback.

Discussion

Compliance with the regulations is a condition precedent to securing drawback. *United States* v. *Lockheed Petroleum Servs., Ltd.*, 709 F.2d 1472 (CCPA 1983); *Ciba Co.* v. *United States,* 27 Cust. Ct. 144, C.D. 1359 (1951). The validity of a drawback claim may be substantiated by testimonial evidence introduced at trial. *See Mantle Lamp Co. of America* v. *United States,* 71 Treas. Dec. 623, T.D. 48,917 (1937); *Lansing Co.* v. *United States,* 424 F. Supp. 112, 115, 77 Cust. Ct. 92, 96 (1976). Therefore, testimony establishing the existence of records required under 19 C.F.R. § 22.4(a) may be substituted in place of the actual documents. Under the facts of this case, the Court finds that plaintiff is entitled to drawback because plaintiff proffered sufficient documentary and testimonial evidence to satisfy the record requirements under 19 C.F.R. § 22.4(a).

Customs' suspicion that the gold jewelry Brink's transported from Aurea to JMS is not the subject imported merchandise is unfounded. It was shown that Aurea generated certain internal credit memo vault slips, informally referred to as "picking orders," authorizing the vault manager of Aurea to have the listed merchandise pulled from inventory and sent to JMS to be melted down into gold ingots. *See* Exhibit B to Aurea's Protest; Trial Transcript at 14. The testimony of Lawrence Burns, former Assistant Controller of Aurea, substantiates Aurea's contention that the gold articles listed on the "picking orders" correspond, albeit circuitously, with the subject imported gold chains and bracelets. *See* Trial Transcript at 15–26. The items listed in the "picking orders" are identified according to Aurea's own method of designating its articles of jewelry. These Aurea style numbers can be traced back to the Gori & Zucchi style numbers and invoices, and the Customs entry numbers. *Id.;* Exhibit C to Aurea's Protest. Therefore, the gold jewelry described

in the "picking orders" is most logically the subject merchandise upon which Aurea previously paid a duty.

Notwithstanding this evidence, Customs questioned whether the gold jewelry Brink's delivered to JMS were the gold items described in the "picking orders," because the only documents that Aurea furnished to establish this identity were the invoices of Brink's. *See* Exhibit G to Aurea's Protest. These invoices list the total value of the gold jewelry but do not detail the identity or weight of the items of Aurea's gold jewelry under Brink's custody. *Id.* The Court, however, is persuaded that the gold jewelry Brink's transported from Aurea to JMS is none other than the subject imported merchandise.

Mr. Burns testified that Aurea's computer-produced daily inventory reports verify that the items listed in Aurea's "picking orders" were removed from the vault of Aurea. Trial Transcript at 24. Juan C. Bellu, former Controller of JMS, testified that JMS received the gold jewelry described in Brink's invoices, along with a copy of Aurea's "picking orders." Trial Transcript at 44. Mr. Bellu further testified that consistent with JMS' business procedure, the items of jewelry that Brink's delivered were weighed, and the resulting weights were recorded onto the "picking orders" for verification. *Id.* at 45. Aurea could not produce these "marked up" credit memo slips, however, because they had been misplaced.

The documentation requirement is necessary for orderly and efficient processing of drawback claims, as well as to ensure absence of fraud in drawback claims. But, inasmuch as the drawback laws are regulatory in nature, Customs may not establish such a strict standard of compliance as to make drawback recovery prohibitive. *See American Pistachio Corp.* v. *United States,* 23 Cust. Ct. 103, 107, C.D. 1198 (1949). In light of Mr. Bellu's testimony that the records in question were properly maintained, it would be prohibitive to deny drawback on the basis of their absence. *See Mantle Lamp Co. of America* v. *United States,* 71 Treas. Dec. at 626, T.D. 48,917.

Similarly, testimonial evidence remedies the alleged inadequacy in JMS' documentation of the manufacturing process. The casting of the 343 exported gold ingots involved three melts which took place on a daily basis for over two weeks. Trial Transcript at 111. JMS recorded one date for each of the first two melts, but did not provide any manufacturing date for the third melt. In response to Customs' concern regarding absence of documentation for the third melt, Salvatore Grasso, former Plant Manager of JMS, testified that a record date was kept in the course of manufacture like the ones maintained for the first and second melts. *Id.* at 118; *see* Exhibits E and F to Aurea's Protest. Further, according to the testimony of Mr. Bellu, the articles of jewelry involved in the third melt were those listed in "picking orders" 29061, 29066, and 29069. *Id.* at 54. Similarly, Mr. Bellu testified that the gold jewelry described in "picking orders" 29060 and 29062 represent the jewelry melted down for

melt one, while "picking orders" 29063, 29064, and 29065 represent the jewelry melted down for melt two. *Id.* at 50–53.

The regulation permits submission of "the date or *inclusive* dates of manufacture or production." 19 C.F.R. § 22.4(a) (emphasis supplied). The day-to-day manufacturing documentation that Customs demands of Aurea may contribute to greater accuracy in drawback claims, but the regulation does not impose such strict requirements where the manufacturing process occurs over a course of time. Therefore, the Court determines that plaintiff's entry of one date for each melt is adequate under the regulation, notwithstanding defendant's assertions to the contrary.

The evidence dispels Customs' underlying doubts in denying drawback, which is the possibility of commingling. Maryanne Carney, the Customs drawback liquidator who determined that drawback should not be granted in this case, testified that "[t]here was no way to prove that the imported goods were the goods that were ultimately melted, which produced these ingots. We never had assurance that merchandise was not commingled * * *." Trial Transcript at 147. Mr. Bellu testified as to the precautionary measures that were taken during the melting and casting process to prevent any commingling between the gold jewelry JMS received from Aurea and other jewelry. It was proven that the JMS inventory during the period in question consisted of gold chains and bracelets described in the "picking orders," as well as domestically purchased silver and gold earrings. It was further shown that the domestic jewelry was kept in a separate area of the vault. *Id.* at 69. Furthermore, plaintiff adequately proved that the area in which melting and casting took place was cordoned off to monitor access into the area. *Id.* at 120.

CONCLUSION

For the foregoing reasons, the Court determines that Aurea has made a valid claim for drawback, pursuant to 19 U.S.C. § 1313(a), on the 343 ingots that Aurea exported from the United States. Therefore, Customs is ordered to refund to Aurea the duties it paid, less 1 percent, plus the applicable interest from the date of the filing of summons in this case.

ABSTRACTED CLASSI

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and ra
C89/176	Musgrave, J. August 22, 1989	George Weintraub 86-3-00417 & Sons Inc.	86-3-00417	Item 379.62 37.5% (Col. 2 r
C89/177	Musgrave, J. August 25, 1989	Teltex, Inc.	87-2-00340	Item 355.25 12.9%
C89/178	Musgrave, J. August 25, 1989	Teltex, Inc.	87-2-00349	Item 355.25 13.8% + 6¢ pe lb., or 12.9% pl 2¢ per lb.
C89/179	Musgrave, J. August 25, 1989	Teltex, Inc.	87-2-00352	Item 355.25 12.9% plus 2¢ p lb.
C89/180	Restani, J. September 11, 1989	Polly Gaz Int'l Corp.	86-3-00295	Item 737.95 12.3% or 10.9%

IFICATION DECISIONS

…	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
rate	Item No. and rate		
rate)	Item 379.62 16.5% (Col. 1 rate)	Agreed statement of facts	Various ports Men's cotton shirts
	Item 359.60 4.3%	Agreed statement of facts	Boston Roofing material
er plus	Item 359.60 6% or 4.3%	Agreed statement of facts	Norfolk Roofing material
per	Item 359.60 4.3%	Agreed statement of facts	Baltimore Roofing material
%	Item A737.15 Free of duty	Agreed statement of facts	New York Scale model cars

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Sixth Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, November 3, 1989 in The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The theme of the Conference is: "The United States Court of International Trade in the 1990's: The Continuing significance of Judicial Review in a Changing Environment."

Ambassador Thomas R. Pickering, The Permanent Representative of the United States of America to the United Nations, is the luncheon speaker.

The Honorable Peter W. Rodino, Jr., former Chairman, Committee on the Judiciary, United States House of Representatives, will present the Honorable Frank J. Guarini, Member of the Ways and Means Committee, United States House of Representatives, with the Court's Distinguished Service Award for his outstanding contributions to the administration of justice in the field of international trade law.

The Honorable Howard T. Markey, Chief Judge, United States Court of Appeals for the Federal Circuit, will be a special guest at the Conference.

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 400 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past five Annual Judicial Conferences.

All interested persons are invited to attend. For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
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Dated: October 2, 1989.

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